

# Law of Occupation vs. *Ius Post Bellum*

## Significance of Provincial Reconstruction Teams in Afghanistan

### Introduction

This article addresses some of the legal challenges arising from non-international armed conflicts, arguing that the general principles of international humanitarian law do not fully meet the requirements of the task. Particularly, I will address the issue of Provincial Reconstruction Teams and the law of occupation. To address these issues, I will refer the concept of counterinsurgency and insurgency. It helps better understand the dynamics related to the modern armed conflicts. The principle of distinction will be presented as part of the discussion on the role of military-oriented humanitarian projects, such as the Provincial Reconstruction Teams. Further, the article will refer to the validity of the law of occupation in the light of concepts such as *ius post bellum* from the perspective of modern counterinsurgency.

### Humanitarian Law vs. Modern Conflict

The law of armed conflict, also known as the laws of war or international humanitarian law, was developed and codified to govern state-to-state conflicts.<sup>1</sup> That was ideological, moral and ethical assumption or background behind the creation of humanitarian law. The traditional, symmetrical warfare is to be understood as an armed conflict between states of roughly equal military strength<sup>2</sup>. War-

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<sup>1</sup> L. Blank, A. Guiora, 'Teaching an old dog new tricks. Operationalizing the law of armed conflict in new warfare', *Harvard National Security Journal*, Vol. 1 (2010), p. 45.

<sup>2</sup> T. Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', *International Review of the Red Cross*, Vol. 87, No. 857 (2005), p. 152, <http://dx.doi.org/10.1017/S1816383100181238>.

ring parties operate under similar principles using similar means and methods of warfare<sup>3</sup>. In traditional conflicts, the need to destroy an enemy has traditionally been considered the centre of gravity, reflecting the concept of Frederick the Great of “complete destruction of one’s enemies” which can be accomplished by death, injury, or any other means<sup>4</sup>.

However, modern conflicts are – in most cases – non-international in character. During such conflicts, non-state actors employ asymmetric means and methods against state military forces.<sup>5</sup> Inequalities in arms and significant disparity between belligerents have become a prominent feature of various contemporary armed conflicts such as the one in Afghanistan. The spread of innovations like portable hand-held missiles, difficult to detect or undetectable explosives, and communication tools offered loosely-organized insurgents affordable and effective means of confronting stronger opponents.<sup>6</sup> Democratization or privatization of the means of warfare provided opportunities for non-state actors to challenge not only their own governments but also the international powers<sup>7</sup> and superpowers.

Additionally in conventional conflicts the centre of gravity of the military operations was to kill or capture the enemy or its military forces. Current conflicts show a significant change in emphasis. The centre of gravity is a civilian population and the war is often conducted to win the “hearts and minds” of the population.<sup>8</sup> What is more, the traditional doctrine to kill and capture is sometimes changed to a more holistic one. The new “win-the-population” doctrine imposes different types of obligation on military forces.<sup>9</sup> The only effective way of “winning” a modern armed conflict is to bring stability, sound economy and rules of law. For that purpose, military means and methods have to be mixed with policing ones. Currently as Pfanner argues “it is debatable whether the challenges of asymmetrical war can be met with the contemporary law of war”.<sup>10</sup> It seems that the current situation may require modification of rules of international humanitarian law. The most recent substantive amendments to Geneva law occurred with the adoption of the Additional Protocols to the Geneva Conventions in 1977. Since then, despite rapid development in international law, little has been done to address burning questions of modern humanitarian law, notwithstanding the adoption of instruments restricting or prohibiting the use of certain types of weapon, including anti-personnel landmines.

<sup>3</sup> E. Benvenisti, ‘The legal battle to define the law on transnational asymmetric warfare’, *Duke Journal of Comparative and International Law*, Vol. 20 (2010), p. 340.

<sup>4</sup> G. Sitaraman, ‘Counterinsurgency, the war on terror, and the laws of war’, *Virginia Law Review*, Vol. 95 (2009), p. 1751.

<sup>5</sup> D. Stephens, ‘Counterinsurgency and Stability Operations. A New Approach to Legal Interpretation’ in R.A. Pedrozo (ed.), *The War in Iraq. A Legal Analysis*, Newport 2010, p. 291.

<sup>6</sup> E. Benvenisti, ‘The legal battle...’, p. 339.

<sup>7</sup> *Ibid.*, p. 339.

<sup>8</sup> Field Manual, op. cit., p. 1-28.

<sup>9</sup> G. Sitaraman, ‘Counterinsurgency...’, p. 1757.

<sup>10</sup> T. Pfanner, ‘Asymmetrical Warfare...’, p. 158.

## Modern Counterinsurgency

Counterinsurgency (COIN) in general “is military, paramilitary, political, economic, psychological and civic actions taken by a government to defeat insurgency”.<sup>11</sup> This non-legally binding definition embraces a broad spectrum of activities.<sup>12</sup> A counterinsurgent’s task is different from a conventional warrior’s one. He or she is supposed to work smarter rather than harder during planning and executing counterinsurgency strategy.<sup>13</sup> Since insurgents derive their support from the local population, only when the local population turns against the insurgency can counterinsurgency be considered successful”.<sup>14</sup> This approach requires a multidisciplinary approach both from scholars and practitioners. During modern counterinsurgency operations it is necessary for military forces to melt into local environment by collecting tribal and demographical intelligence as well as threat intelligence.<sup>15</sup> It is also vital to require knowledge on subjects such as governance, economic development, public administration and the rule of law.<sup>16</sup>

Modern counterinsurgency operations are not a new development, but they have never before seemed to be so essential to future conflicts.<sup>17</sup> Counterinsurgency embraces holistic activities orientated on civilian population. Killing the opponent is considered a last resort.<sup>18</sup> This argument is supported by gen David Petraeus in his *Manual on Counterinsurgency* where he presents some of the major principles of conducting anti insurgency operations. They are as follow: a) sometimes, the more you protect your force the less secure you may be, b) some of the best weapon for counterinsurgent is do not shoot, c) sometimes, the more force is used, the less effective it is, and d) the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.<sup>19</sup>

During counterinsurgency operations shift of the weight has to be addressed on defensive, and stability operations. In particular it is civil security, essential services, governance, economic and infrastructure development.<sup>20</sup> The balance of offensive and defensive operations is essential to counterinsurgency. In that

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<sup>11</sup> U.S. Army and U.S. Marine Corps Counterinsurgency Field Manual. U.S. Army Field Manual No. 3-24. Marine Corps Warfighting Publication No. 3-33.5, Chicago 2007, p. 1.1 50 McGill L.J. 285 (hereinafter: COIN Manual).

<sup>12</sup> J. Kelly, ‘Legal aspects of military operations in counterinsurgency’, *Military Law Review*, Vol. 21 (1963), p. 95.

<sup>13</sup> D. Stephens, ‘Counterinsurgency...’, p. 292.

<sup>14</sup> G. Sitaraman, ‘Counterinsurgency...’, p. 1773.

<sup>15</sup> D. Kilcullen, ‘Intelligence’ in T. Rid, T. Keaney, *Understanding Counterinsurgency. Doctrine, Operations, and Challenges*, Routledge–London 2010, p. 147.

<sup>16</sup> COIN Manual, p. X.

<sup>17</sup> G. Sitaraman, ‘Counterinsurgency...’, p. 1770.

<sup>18</sup> D. Kilcullen, ‘Intelligence’, p. 5.

<sup>19</sup> COIN Manual, p. 1-149, 1-153, 1-150, 1-151.

<sup>20</sup> *Ibid.*, p. 1-19.

respect COIN differs from peacekeeping operation. In peacekeeping operations absence of violence is a goal. In COIN situation the goal is much more compound where lack of violence may mask insurgent's preparation for combat.<sup>21</sup> However the cornerstone of any counterinsurgency is to establish security for the civilian population. Without secure environment, no reforms can be implemented.<sup>22</sup> Security based not on military presence in military bases and travelling in armoured vehicles from point A to B, but rather on proximity to the local population, foot patrolling etc.<sup>23</sup> To be successful in counterinsurgency troops have to engage with the populace. Close contact with local population allows soldiers to learn to understand social environment, to build trust and to have opportunity to obtain intelligence.<sup>24</sup> According to gen Petraeus "kindness and compassion can often be as important as killing and capturing insurgents".<sup>25</sup> To successfully counter insurgents one must also heavily rely on the indigenous security and military forces. It embraces sponsoring, training and mentoring local forces.

All parties to the asymmetric conflict conduct both civilian and military actions. Insurgents are blended with the civilian population as the enemy moves within and through the population, whereas the governmental and foreign armed forces carry out projects which are often not military in nature. As a result during counterinsurgency operation it is difficult to define what military effort is and what is not. This issue have to be considered with the one fundamental assumption in mind. Observance of humanitarian and human rights law is in case of counterinsurgency of an utmost importance. Any human rights or humanitarian law abuse committed by intervening forces – apart from strictly moral dimension has also a pragmatic one. Each such an event quickly becomes known throughout the local population and eventually around the world. Illegitimate actions undermine counterinsurgency effort in both long and short term aspect.<sup>26</sup>

## Provincial Reconstruction Team

One of the best known ISAF programmes, which constitutes a part of counterinsurgency effort, is the Provincial Reconstruction Teams (PRTs) project. Such teams operate in each province under control of the ISAF countries and coordinate, develop, and fund local projects. Their aim is to rebuild the country in cooperation with local population which is to determine what is needed to make society stable and secure from the insurgent ideology. Provincial Recon-

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<sup>21</sup> Ibid., p. 1-20.

<sup>22</sup> Ibid., p. 1-23, par. 1-131.

<sup>23</sup> D. Kilcullen, 'Intelligence', p. 35.

<sup>24</sup> COIN Manual, p. 5-9, table 5-1.

<sup>25</sup> Ibid., p. 5-12, table 5-2.

<sup>26</sup> Ibid., p. 1-24, par. 1-132.

struction Teams are considered as a mean to extend the reach and enhance the legitimacy of the central government. They usually consist of 50 to 300 troops and representatives of development and diplomatic agencies.<sup>27</sup> In secure areas PRTs maintain low profile whereas in more volatile PRTs work closely with combat units and local government.<sup>28</sup> In every case PRT's activity embraces security sector reform, building local governance, reconstruction and development.<sup>29</sup> Despite their humanitarian agenda they constitute an element of counterinsurgency warfare with military aims as a goal. These projects are used to gain the trust and support of the local population and this way supporting the counterinsurgency efforts. The Provincial Reconstruction Team may be seen as military answer addressing the security sector reform, reconstruction, development and governance which are domains of humanitarian organizations.<sup>30</sup> But in reality the establishment of PRT by the Coalition forces in Afghanistan has blurred the lines between the role and objectives of political and military players on the one hand and humanitarian players on the other.

The question of the legality of the PRT is important. PRTs focus their humanitarian activity on civilian population. But it has to be noted that PRTs are included in the military structure. Personnel engaged in these projects wear uniforms and are under military chain of command and responsibility. These projects are orientated toward a military (politically motivated) gain. As such their activities blur the line between what is and what is not military action and may affect the principle of distinction.

It is difficult to establish a legal framework for PRT activities. This is because it is a new invention, not regulated by humanitarian law. To address legal ramification of PRT it is necessary to refer to the already existing humanitarian law norms. Common article 3 says "in the case of armed conflict not of an international character [...] each party to the conflict shall be bound to apply, as a minimum, the following provisions: Persons taking no active part in the hostilities, [...] shall in all circumstances be treated humanely".<sup>31</sup> Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood.<sup>32</sup> So humanitarian projects run by military forces may be considered as being correspondent with the common Art. 3. Similarly Geneva Conventions Additional Protocol II also states the

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<sup>27</sup> Ibid., p. 2-12, par. 2-51.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> R.J. Bebbler, 'The Role of Provincial Reconstruction Teams (PRTs) in Counterinsurgency Operations: Khost Province, Afghanistan', *Small Wars Journal*, 31 March 2011.

<sup>31</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 U.N.T.S. 31, entered into force 21 October 1950.

<sup>32</sup> ICRC Commentary on GC I, p. 53, at <<http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>>.

principle of humanitarian treatment by art. 4.<sup>33</sup> A good example is provided by Art. 4.3 of AP II which states that children shall be provided [...] (a) education. This corresponds to the PRTs activity in terms of building schools and providing relevant educational materials such as books. The above mentioned regulations indicate that treaty law does not forbid humanitarian activities which enter within the scope PRT's effort.

The analysis becomes more complicated if we try to look at the legal constraints of the PRT's activity from the perspective of the principle of distinction. The principle of distinction holds that "parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".<sup>34</sup> The principle is expanded to non-international armed conflict by article 13 of Additional Protocol II which provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".<sup>35</sup> The importance of the principle is highlighted by art 85 (3) (a) Additional Protocol I, which states that violation of the principle of distinction is deemed a grave breach and under art 85 (5) a war crime. Additionally the principle of distinction attained customary status which means that it is applicable for both international and non-international armed conflicts (also these regulated only by common Art. 3 of Geneva Conventions).

This issue becomes even more complex when we approach the notion of military objectives. AP II applicable during non international conflict such as in Afghanistan has little to say about the principle of distinction in terms of military objectives. In this respect customary law is more specific. Rule 8 of the ICRC study on customary law says: "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".<sup>36</sup> This definition of military objectives is currently "widely accepted".<sup>37</sup>

PRT's effort is an intrinsic part of counterinsurgency and constitutes an effective contribution to military effort, in the sense that it enhances the likelihood of success. Every school, every police building, every road and every hospital built by

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<sup>33</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force 7 December 1978.

<sup>34</sup> Art. 48 AP I.

<sup>35</sup> International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary*, p. 11, at <<http://www.dur.ac.uk/resources/law/NIAC-ManualIYBHR15th.pdf>>.

<sup>36</sup> ICRC Customary rules index, at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8)>.

<sup>37</sup> Ibid.

PRT forms a part of the military counterinsurgency measures. It is a part of a battle for "hearts and minds". It is smart, it is pragmatic but it is still warfare. Especially since PRTs are responsible not only for construction of civilians orientated buildings like schools but also for construction buildings which are police or military in nature such as for example police academy in Nuristan Province.<sup>38</sup> It some respect it resembles the situation of the Israel in occupied territories. Building infrastructure of governance increases governmental control over the land. Although infrastructure is civilian, the results are military and they constitute a response toward insurgency.<sup>39</sup> PRT's projects are positively resulting on behalf of central government in Kabul. Thus they directly support both governmental control over provinces and actions against former, Taliban government. So the question is whether military built objects are military objectives?

There are two possible ways of qualifying PRT projects in legal terms. The first option is that we will consider the status of schools, and other community orientated constructions, as military. It is because all NATO's PRT sponsored actions could be considered as a winning hearts and minds strategy. It is part of counterinsurgency and offers definite military advantage. This approach is supported by the gen Petraeus position presented in COIN manual. According to him "all operations have an intelligence (military) component. All soldiers and marines collect information whenever they interact with population. Operations should therefore always include intelligence collection requirements".<sup>40</sup> As a result of such approach PRT's projects and achievements need to be considered as a military objectives and legitimate target.

The second option is to accept PRT activity as partially civilian in character and exclude their results from being considered as legitimate targets for insurgents. PRT staff is included in the military chain of command and responsibility. They wear uniforms and a distinctive sign. They are protected by military escort. While performing their task they are legitimate target. But when their task is finished a school or a road which was built becomes a civilian object protected by the humanitarian law.<sup>41</sup>

Nowadays there is no alternative to military-sponsored aid. PRTs are part of a counterinsurgency effort. Their actions may affect principle of distinction. But also there is little choice. Only governments are able to provide the amount of money which significantly changes the situation in places like Afghanistan. Only

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<sup>38</sup> Army Staff Sgt. G. Caligiuri, 'Nuristan PRT brings professional training to ANP', at <[http://www.blackanthem.com/News/Allies\\_20/Nuristan\\_PRT\\_brings\\_professional\\_training\\_to\\_ANP5055.shtml](http://www.blackanthem.com/News/Allies_20/Nuristan_PRT_brings_professional_training_to_ANP5055.shtml)>, 24 November 2011.

<sup>39</sup> G. Swiney, 'Saving Lives. The Principle of Distinction and the Realities of Modern War', *The International Lawyer*, Vol. 39 (2005), p. 754.

<sup>40</sup> COIN Manual, p. 3-1, par. 3-4.

<sup>41</sup> It is also disputable. For insurgents destruction of the school offers a definite military advantage when hearts and minds or terrorizing of the local community is at stake.

governments are able to provide some form of protection to PRT specialists. In asymmetric, non-international armed conflict PRTs are a necessary element.

## Law of Occupation from the Perspective of Modern Conflicts

Provincial Reconstruction Teams are an element of a bigger phenomenon i.e. a responsibility to bring the particular state to stability. Their activities are often conducted within the framework of nation building or quasi occupation. The important question here is what is and what is not allowed under the law of occupation? Is it allowed under international law to use PRT to change the country? These questions bring us to the issue whether PRTs activities violate the law of occupation.<sup>42</sup>

The legal status of the occupier is regulated by the 1907 Hague Regulation (articles 42-56). The most relevant article 43 states: "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".<sup>43</sup> This regulation (already in existence for more than a hundred years) reflects the position at that time. The final status of occupied territory was a matter to be resolved by the parties in a peace treaty. In the meantime, the task of international law was to preserve status quo.<sup>44</sup>

Complementary to the Hague Regulation was the IV Geneva Convention relating to the protection of civilian persons in time of war<sup>45</sup> – particularly articles 27-34 and 47- 48 which refer to the legal obligations of the occupier. These articles establish a minimum standard of governance.<sup>46</sup> IV GC also introduces a cessation of the applicability of Convention. It states in Art. 6 "that the application of the present Convention shall cease on the general closure of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general closure of military operations". Additional Protocol I de-

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<sup>42</sup> G.T. Harris, 'The Era of Multilateral Occupation', *Berkeley Journal of International Law*, Vol. 24 (2006), p. 2. More on notion of occupied territory see: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, p. 78 (9 July): "Territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised".

<sup>43</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>44</sup> Ch. Garraway, 'From relevance of jus post bellum. A practitioner's perspective' in C. Stahn, J.K. Kleffner, *Jus Post Bellum. Towards a Law of Transition, from Conflict to Peace*, Hague 2008, p. 153.

<sup>45</sup> Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge 2009, p. 7.

<sup>46</sup> G.H. Fox, *Humanitarian Occupation*, Cambridge 2008, p. 238.



velops these standards. As a supplementary to treaty law several customary rules were also recorded in the ICRC study on particular aspects of occupation.<sup>47</sup> Short summary of the treaty law and customary law indicates that occupation should fulfil three assumptions: occupation is temporary, non transformative, and limited in scope.<sup>48</sup> As a result any attempt to permanently reform or change an occupied state would be unlawful.<sup>49</sup> But the premise that occupiers will preserve *status quo ante*, as convincingly Kirsten Bonn writes, demonstrated to be a fiction.<sup>50</sup> The issue related to the applicability of the law of occupation is that the consistent and almost universal disuse of it calls into question to what extent this branch of humanitarian law retains legal authority.<sup>51</sup> State practice indicates almost no compliance with the law of occupation; this is sometimes illustrated by the general lack of meaningful international condemnation when it is disregarded.<sup>52</sup> As Harris says "the law of occupation long had been in a state of innocuous desuetude"<sup>53</sup> What makes this law even less relevant to modern challenge is that the main body of treaty and customary regulations are applicable only during an occupation resulting out of international armed conflict.

If law of occupation importance has decreased in recent years, than the question is what next? Should the intervening states rebuild the country which was invaded? Is international community responsible for Afghanistan or other conflict areas? It seems that the answer is yes. Without positive western world contribution these areas may turn into rouge states where human rights violations occur and international terrorism and organized crime finds shelter.

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<sup>47</sup> See: rule 41 and 51 of ICRC study on customary law, at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter12\\_rule41?OpenDocument&highlight=occupation](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule41?OpenDocument&highlight=occupation)>.

<sup>48</sup> N. Bhuta, 'The Antinomies of Transformative Occupation', *European Journal of International Law*, Vol. 16, No. 4 (2005), p. 726, <http://dx.doi.org/10.1093/ejil/chi145>. See: Hague Convention (IV) on respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Art. 55: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".

<sup>49</sup> G.T. Harris, 'The Era...', p. 9. "For example change of the laws of the occupant is permissible if 'necessitated' by the occupant's interest or by military necessity". Prof. Openheim quoted by the E.H Schwenk in 'Legislative Power of the Military Occupant under Article 43 Hague Regulations', *Yale Law Journal*, Vol. 54, No. 2 (1945), p. 400.

<sup>50</sup> K.E. Boon, 'Legislative Reform in Post-conflict Zones. Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', *McGill Journal of Law*, Vol. 50 (2005), p. 306.

<sup>51</sup> G.T. Harris, 'The Era...', p. 11. Similar situation of transformative occupation took place not only in Afghanistan and Iraq but also in Kosovo, Bosnia and Herzegovina, Cambodia and East Timor just to mention a few. More on it see: N. Bhuta, 'The Antinomies...', pp. 735-736.

<sup>52</sup> G.T. Harris, 'The Era...', p. 11. It is difficult to find any example of occupation which is conducted according to all principles of occupation law within last 100 years.

<sup>53</sup> *Ibid.*, p. 10.

## Is There a Need for a New Law?

Popularity of the PRTs, the new approach to counterinsurgency and law of occupation *desuetudo* brings us to a concept which embraces all of it i.e. *ius post bellum*. It is a broad concept embracing both conflict and post conflict societies.<sup>54</sup> It is perceived as a framework to deal with challenges of post conflict transformation and state building. It has also been associated with the conduct of legislative reforms in post conflict areas and the consolidation of the rule of law.<sup>55</sup> This concept has a long history since it was already recognized by the German philosopher and just war theorist, Immanuel Kant, at the end of eighteenth century.<sup>56</sup> But from the perspective of contemporary legal discussion the question is however, whether it has any legal meaning.<sup>57</sup>

As argued previously, the law of occupation is increasingly perceived as an insufficient answer to the legal challenges of peace building<sup>58</sup> or modern counterinsurgency. So the fundamental question is whether *ius post bellum* can be understood in a normative sense, as a concept which regulates the relationship between participants of armed conflict in situations of transition, rather than a moral principle or a legal catchphrase.<sup>59</sup>

The regulation which may indicate the *in statu nascendi* character of *ius post bellum* is UN SC Resolution 1483.<sup>60</sup> The Security Council created a framework where the Special Representative of the Secretary General acting in collaboration with Coalition Provisional Authority in Iraq (CPA) was given a specific task to undertake changes in Iraqi infrastructure which went far beyond what might be per-

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<sup>54</sup> E. van Zadel, I. Österdahl, 'What will jus post bellum mean? Of new wine and old bottles', *Journal of Conflict & Security Law*, Vol. 14, (2009), p. 176.

<sup>55</sup> C. Stahn, 'Jus post bellum. Mapping the discipline(s)', *American University International Law Review*, Vol. 23 (2008), p. 321.

<sup>56</sup> R.P. DiMeglio, 'The evolution of Just war tradition. Defining jus post bellum', *Military Law Review*, Vol. 186 (2005), p. 133.

<sup>57</sup> E. van Zadel, I. Österdahl, 'What will jus...', p. 175.

<sup>58</sup> C. Stahn, 'Jus post bellum...', p. 321.

<sup>59</sup> Ibid.

<sup>60</sup> S/RES/1483 (2003). This particular Resolution on is interesting. On one hand it support law and institution revision when at the same time it support idea of respecting the same laws and institutions, what is seems to be contradictory. See Art. 4 Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future; where Art. 5 Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. The same point of view is represented by many scholars, see: D.J. Scheffer, 'Beyond Occupation Law', *American Journal of International Law*, Vol. 97, No. 4 (2003), p. 844, <http://dx.doi.org/10.2307/3133684>.

mitted under a conservative approach toward the law of occupation.<sup>61</sup> As a result the CPA adopted over 100 measures designed to remove the legal and institutional instruments of the Husain regime.<sup>62</sup> The Security Council's resolutions played similar role in other "quasi-occupation" situations, such as Kosovo<sup>63</sup> and East Timor.<sup>64</sup> This raises questions about the relationship between UN regulations and international humanitarian law. To what extent may UN Security Council Resolutions supplement and override the provisions of humanitarian law?<sup>65</sup> This particularly worth looking at in the light of Art. 103 of the UN Charter which states: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".<sup>66</sup> This article provides clear interpretation guidance. In case of conflict between treaty law and Security Council resolutions the latter overrides.

The notion of *ius post bellum* was utilized not only by Security Council in its resolutions but also in other UN documents. For example United Nations Secretary General Boutros Boutros Ghali in his proposal for post conflict peace building in "Agenda for Peace from 1992 referred to the *ius post bellum* concept.<sup>67</sup> These may indicate *in statu nascendi* process of *ius post bellum* concept.

This approach of disuse of GC IV leads countries to refer mostly or entirely to the UN resolutions which govern multilateral peace or peace enforcement operations. Taking into consideration the asymmetrical character of modern conflicts, nation building and counterinsurgency under the UN umbrella seem to be not only an interesting but a necessary option. The Development of the concept of human rights obliges the international community not only to intervene but also to create an environment where mass atrocities/war crimes/genocide are much less likely to take place in the future. To prevent this, state building, implementation of good governance, and the support of a sound economy have to take place. All these activities constitute a broad interpretation of *ius post bellum*.

Interestingly modern counterinsurgency and *ius post bellum* share the same principles and methods vide Afghanistan or Iraq. In terms of principles both are orientated towards bringing and sustaining peace to a civilian population as the

<sup>61</sup> Ch. Garraway, 'From relevance...', p. 155.

<sup>62</sup> B.H. McGurk, 'Revisiting the law of nation building. Iraq in transition', *Virginia Journal of International Law*, Vol. 45 (2005), p. 461.

<sup>63</sup> SC enacted Resolution 1244 which provided a legal basis for the international presence with power to build democratic institutions and reform economic structures in Kosovo. This resolution did not refer to the international law of occupation although Kosovo was occupied by international forces. More on it see: *ibid.*, p. 455.

<sup>64</sup> Ch. Garraway, 'From relevance...', p. 155.

<sup>65</sup> *Ibid.*

<sup>66</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>67</sup> M. Pugh, 'The challenges of post conflict intercession. Three issues in international politics' in C. Stahn, J.K. Kleffner, *Jus post bellum...*, p. 116.

centre of gravity. As to the methods, they are orientated toward nation building, rule of law and development of the country infrastructure and economy. Of course counterinsurgency is only relevant in situations where insurgency exists, whereas *ius post bellum* is relevant both where insurgency exists and situations where it does not exist. Counterinsurgency is considered as a method of warfare. *Ius post bellum* is considered as an *in statu nascendi* legal concept. In both cases PRT is an important element of bringing peace and stability.

## Conclusion

Modern counterinsurgency rejects kill-capture strategy. Instead, counterinsurgents follow win-the-population strategy, which is directed on building a stable and legitimate political order.<sup>68</sup>

Modern conflicts pose a challenge toward treaty law. Treaty law was created to fit conventional wars. Such wars are no longer dominant. A brief analysis of the last 60 years of world's history indicates clearly that international wars constitute a minority. The new standards require not only military interventions with humanitarian agenda but also better protection of human rights. This approach is confirmed not only by strategists but also by the international community. For example, UN Resolution 1674 on importance of preventing conflicts through development emphasized the importance of preventing an armed conflict through the promotion of economic growth, poverty eradication, sustainable development, national reconciliation, good governance, and democracy, the rule of law, as well as respect for, and protection of human rights.<sup>69</sup> Transformations of Bosnia and Herzegovina, Kosovo or East Timor are good examples of such approach. At the same time, the lack of engagement of Americans in state building in Afghanistan in 1988 after Russian's withdrawal is an example how things may go wrong. The same type of international failure at the beginning of 1990's led to genocide in Rwanda.

Humanitarian law needs to be adapted to work in an asymmetric environment of non-international armed conflict. What is allowed under conventional IHL may not be acceptable in a modern counterinsurgency policy.<sup>70</sup> Killing a member of a particular community instead of arresting him may fuel insurgency rather than limit it.<sup>71</sup> This is because protecting the population is a centre of gravity to the counterinsurgent's strategy.<sup>72</sup> Particularly with the rise of instant communication and publicity, any kill-capture operation could easily be found unreasonable by

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<sup>68</sup> G. Sitaraman, 'Counterinsurgency...', p. 1745.

<sup>69</sup> UNSC Resolution 1674, at <<http://www.un.org/News/Press/docs/2006/sc8710.doc.htm>>.

<sup>70</sup> G. Sitaraman, 'Counterinsurgency...', p. 1775.

<sup>71</sup> Ibid., p. 1788

<sup>72</sup> Ibid., p. 1790.

domestic and international opinion and reduce the legitimacy of the intervening counterinsurgent forces and their ability to win "hearts and minds".<sup>73</sup>

The issues discussed above share one common feature – uncertainty of applicability of law. It is difficult to convince a local population that heavy armoured vehicle, full of looking like robots soldiers are much needed humanitarian help provided by PRT. It is not easy for an Afghan farmer to understand that destruction of his crops was legal collateral damage under international humanitarian law. It is also complicated to convince members of national Shura that the laws and types of government which NATO forces support are better than their own, hundreds years old system. This uncertainty also applies on global level. States are unable or unwilling to intervene in to affairs of other states even failed one. It is also difficult to find states willing to provide military or humanitarian support to rebuild the state for ten or fifteen years.

New wars where counterinsurgency is fought do not pose strategic threat to superpowers such as the USA, the UE or China. However these low intensity conflicts may not be left alone. They will be more and more common. Justification of the future asymmetric character of the conflicts also lays in economy. According to Kuźniar, 16% of world's population spends 75% of global military expenses. As he argues an overwhelming power and range of military burden expenditure of rich countries will push poorer countries and entities into asymmetric warfare.<sup>74</sup> This is why it is so important to face the challenge and try to analyse law applicable during modern asymmetrical, non-international armed conflicts. These wars modify traditional, conventional laws of war. Humanitarian law created for Eurocentric world needs to be foremost applicable in places such as Rwanda or Afghanistan.

Western hemisphere is particularly responsible for bringing peace and stability to places where violation of human rights occurs. It is due to fact that most of these places were exploited in the past by westerners. This obligation has to be combined with rebuilding of a state. It means that maybe it is time to think how to change the law in order to meet the challenges of the modern armed conflicts.

## Abstract

The establishment of the Provincial Reconstruction Team (PRT) by the Coalition forces in Afghanistan has blurred the lines between military and civilian targets and has affected the principle of distinction. This paper argues the legality of PRT's activity in Afghanistan and raises general questions addressing legal challenges resulting out of modern armed conflict. This issue is particularly important especially taking into consideration that modern armed conflict overlaps with responsibility to rebuild of the country where the conflict takes place.

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<sup>73</sup> Ibid.

<sup>74</sup> R. Kuźniar, *Polityka i siła. Studia strategiczne. Zarys problematyki*, Warszawa 2005, pp. 294-295.

The paper was divided into five substantial parts: Humanitarian law vs. modern conflict – which addresses the law applicable during conflicts of our times; modern counterinsurgency – which describes a new approach toward asymmetric conflicts; Provincial Reconstruction Team – which addresses a notion of a vital element of a counterinsurgency effort; Law of occupation from the perspective of modern conflicts – which discuss that law of occupation is not longer as relevant as it was at the time of its creation; Is there a need for a new law? – which argues that above mentioned concepts leads to necessity to critically approach some element of humanitarian law.

## **Piotr Łubiński**

Piotr Łubiński obtained his Master's degree from the Faculty of Law and Administration of the Jagiellonian University in Krakow (Poland) in 2004. He worked for the Jagiellonian University Human Rights Centre as a researcher until 2006. In 2007 he practiced law – as a judge assistant – working on behalf of the Criminal Court in Krakow, International Affairs Section. In 2008, he joined the Polish Military Forces Contingent in Afghanistan as a Legal Adviser, serving two tours. Later on, he was granted a scholarship by the Law and Criminology Department, University of Wales in Aberystwyth. Additionally to his researcher obligation, he was working there as a part-time tutor. He successfully defended his doctoral thesis on “Practical and Theoretical Aspects of Internationalized Tribunals” at the Jagiellonian University in 2012. Currently, he holds position of lecturer at the Department of Security Affairs and Civic Education at the Pedagogical University in Krakow.

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